

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CROSS-FIT, INC., a Delaware
corporation,

Plaintiff,

v.

NATIONAL STRENGTH AND
CONDITIONING ASSOCIATION, a
Colorado corporation,

Defendant.

Case No.: 14cv1191-JLS(KSC)

**ORDER RE RENEWED JOINT
MOTION FOR DETERMINATION
OF DISCOVERY DISPUTE
(PUBLISHING AGREEMENTS);**

**PROTECTIVE ORDER; AND
ORDER QUASHING, IN PART,
SUBPOENA SERVED ON THIRD
PARTY LWW**

[Doc. No. 104.]

Before the Court is a Renewed Joint Motion for Determination of Discovery Dispute. [Doc. No. 104.] In the Renewed Joint Motion, defendant seeks an order: (1) quashing a subpoena plaintiff served on third party Lippincott Williams & Wilkins (“LWW”) pursuant to Federal Rule of Civil Procedure 45 which seeks, in part, to obtain un-redacted copies of certain publishing agreements; and (2) limiting disclosure of the publishing agreements to redacted copies. [Doc. No. 104, at pp. 15-16.] Defendant does not object to production of the subject publishing agreements in redacted form subject to the joint Protective Order filed in this case on August 16, 2014. [Doc. No. 104, at p. 7,

1 citing Doc. No. 12.] Plaintiff seeks an order enforcing the subpoena on LWW and
 2 compelling production of un-redacted copies of the publishing agreements subject to the
 3 August 16, 2014 stipulated Protective Order. In addition, plaintiff seeks to recover
 4 reasonable expenses for participating in bringing the Joint Motion. [Doc. No. 104, at pp.
 5 24-27.]

6 For the reasons outlined more fully below, the Court finds that plaintiff's request
 7 for an order enforcing, in part, the Rule 45 subpoena and compelling LWW to produce
 8 un-redacted copies of the publishing agreements must be DENIED. The Court also finds
 9 that defendant's request for an order quashing, in part, plaintiff's Rule 45 subpoena
 10 served on LWW must be GRANTED, to the extent the subpoena seeks un-redacted
 11 copies of defendant's publishing agreements with LWW. In addition, the Court finds that
 12 defendant's request for a protective order precluding production of un-redacted copies of
 13 its publishing agreements with LWW must be GRANTED.

14 *Allegations in the First Amended Complaint*

15 The First Amended Complaint ("FAC") filed on February 29, 2016 includes causes
 16 of action for false advertising, unfair competition, declaratory relief, and trade libel. [Doc.
 17 No. 71-6, at p. 3.] According to the FAC, plaintiff Cross-Fit, Inc. and defendant National
 18 Strength and Conditioning Association ("NSCA") "are competitors in the fitness industry."
 19 [Doc. No. 71-6, at p. 3.] The FAC alleges that defendant NSCA and "its long-time peer,
 20 the American College of Sports Medicine (the 'ACSM'), are two pillars of this traditional
 21 fitness establishment." [Doc. No. 71-6, at p. 4.] Plaintiff, on the other hand, "is a relatively
 22 new player in the fitness space" with "a radically different approach" to fitness. [Doc. No.
 23 71-6, at p. 4.]

24 Defendant publishes the *Journal of Strength and Conditioning Research* ("JSCR")
 25 which has a "large readership." [Doc. No. 71-6, at pp. 5, 9.] The key allegations in the FAC
 26 are as follows: "In November 2013, the JSCR published a study by Steven T. Devor (an
 27 ACSM 'fellow'), Michael M. Smith, Allan J. Sommer, and Brooke E. Starkoff, entitled
 28 'Crossfit-based [sic] high intensity power training improves maximal aerobic fitness and

body composition’ (the ‘Devor Study’).¹ The Devor Study purported to track a ten-week CrossFit program. While the Devor Study correctly found that CrossFit improved the athletes’ fitness levels, it also reported that nine of fifty-four participants (16% of the sample population) dropped out of the program due to ‘overuse or injury.’ That assertion was based on false data.” [Doc. No. 71-6, at p. 5.]

More specifically, the FAC alleges that defendant published the following false, misleading, and/or deceptive statements about CrossFit’s injury rates in the Devor Study: (1) “[N]ine subjects (16% of total recruited subjects) cit[ed] overuse or injury for failing to complete the [CrossFit] program and finish follow up testing;” and (2) “[T]here are emerging reports of increased rates of musculoskeletal and metabolic injury in these programs [including CrossFit].” [Doc. No. 71-6, at pp. 18-19.]

According to the FAC, it is simply not true that nine participants dropped out of the program because of overuse or injury. [Doc. No. 71-6, at p. 3, 5.] In addition, plaintiff believes that the false data and information in the Devor Study was “contrived” not only to dissuade people from using CrossFit as a form of exercise but also to dissuade trainers from seeking certification as CrossFit trainers. [Doc. No. 1, at pp. 5-6.] Plaintiff confronted defendant with facts indicating study participants did not drop out of the program because of overuse or injury, but defendant “failed to retract the false Devor Study.” [Doc. No. 71-6, at p. 14-15.]

New allegations in the FAC are that defendant published and distributed an “Erratum” related to the Devor Article that included two additional false, misleading, and harmful statements. [Doc. No. 71-1, at p. 2; 71-6, at pp. 17-18.] The first challenged statement in the Erratum is that “the injury rate should not be considered a factor in this [S]tudy. This change does not affect the overall conclusion of the article.” [Doc. No. 71-6, at p. 17.] The FAC alleges that it was not appropriate for defendant to stand behind the

¹ The Devor Study is sometimes referred to as the “Devor Article,” the “published article,” and the “Study.”

1 “overall conclusion” of the Devor Study knowing it included false and/or misleading
 2 information. [Doc. No. 71-6, at p. 18.] The second challenged statement in the Erratum is
 3 that “[a]fter the article was published, 10 of the 11 participants who did not complete the
 4 study have provided their reasons for not finishing, with only 2 mentioning injury or health
 5 conditions that prevented them from completing follow-up testing.” [Doc. No. 71-6, at p.
 6 17.] The FAC alleges that “[i]n reality, the two Study participants that ‘mention[ed] injury
 7 or health conditions’ explicitly clarified that their injury or health conditions stemmed from
 8 activities outside of the Devor Study.” [Doc. No. 71-6, at p. 18.]

9 **Relevant Procedural History**

10 On August 20, 2014, the Court entered a stipulated Protective Order governing the
 11 exchange of documents during the litigation that might contain “trade secret or other
 12 confidential research, technical, cost, price, marketing or other confidential research,
 13 technical, cost, price, marketing or other commercial information, as contemplated by
 14 Federal Rule of Civil Procedure 26(c)(1)(G).” [Doc. No. 14, at p. 1.] Under the
 15 Protective Order, a disclosing party may designate and mark documents or information as
 16 “confidential” or “confidential – for counsel only” if the party has a good faith belief that
 17 unrestricted disclosure could be harmful or prejudicial. [Doc. No. 14, at p. 3.] Any such
 18 documents are then entitled to special treatment and can only be disclosed to persons
 19 designated in the Protective Order. [Doc. No. 14, at pp. 4-6.] Use of any documents or
 20 information marked as “confidential” or “confidential – for counsel only” can only be
 21 used for purposes of this action. [Doc. No. 14, at p. 6.] In addition, the parties must
 22 “take reasonable precautions to prevent the unauthorized or inadvertent disclosure of
 23 such information” and must not seek to file any such documents with the Court without a
 24 motion to file the documents under seal. [Doc. No. 14, at pp. 6-7.]

25 The parties refer to the instant Joint Motion as “Renewed,” because the Court
 26 previously addressed the same issues in a prior Joint Motion. [Doc. Nos. 70, 89.] Based
 27 on the briefing submitted by the parties in the prior Joint Motion, the Court was unable to
 28 determine whether a protective order prohibiting production of un-redacted copies of the

1 publishing agreements was really warranted or whether plaintiff was entitled to an order
 2 compelling production of the un-redacted copies of the publishing agreements. [Doc. No.
 3 189, at p. 5.] As a result, the Court denied both parties' requests in the Joint Motion
 4 without prejudice and allowed the parties additional time to meet and confer and re-brief
 5 the issues. [Doc. No. 89, at p. 7.]

6 Although the parties filed their "renewed" Joint Motion, they did not satisfy the
 7 meet and confer requirements. Local Civil Rule 26.1(a) requires the parties to meet and
 8 confer in person if they are located in the same county and by telephone if they are
 9 located in different counties. CivLR 26.1(a). According to the Declaration of Brandon
 10 Braga, the parties merely exchanged e-mails about this issue before filing their
 11 "renewed" Joint Motion. [Doc. No. 104-11, at p. 3, citing Exhibit F.] Ordinarily, the
 12 Court would reject the parties' Joint Motion for failure to satisfy the meet and confer
 13 requirements. However, the Court will resolve the parties' "renewed" Joint Motion at
 14 this time for the sake of judicial efficiency. Discovery has been closed for some time
 15 now and the parties are headed for trial. Requiring the parties to meet and confer and re-
 16 file their "renewed" Joint Motion would only serve to further delay the case. Counsel
 17 are advised that any future motions will be rejected if they fail to satisfy the meet and
 18 confer requirements.

19 Discussion

20 The parties' discovery dispute arises from a Rule 45 subpoena served by plaintiff
 21 on third party LWW seeking: "All documents and communications concerning any
 22 partnerships, affiliations (whether formal or informal), or other relationships between
 23 [LWW] and [defendant], the JSCR, and/or ACSM." [Doc. No. 104, at p. 6.] In response
 24 to plaintiff's subpoena, LWW produced redacted versions of its publishing agreements
 25 with defendant. When plaintiff later demanded that LWW produce un-redacted copies of
 26 the publishing agreements, defendant objected, and the matter remains in dispute. [Doc.
 27 Nos. 104, at p. 6; 89, 70.]

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1 Defendant argues that disclosure of the publishing agreements in un-redacted form
 2 would reveal irrelevant, sensitive, confidential, private financial information that
 3 defendant considers to be a trade secret.² [Doc. No. 104, at p. 7-8; Doc. No. 104-20, at p.
 4 2.] Because of the nature of the information in the un-redacted portions of the publishing
 5 agreements, defendant believes that the August 20, 2014 Protective Order does not
 6 provide sufficient protection against inadvertent disclosure that would be harmful to
 7 defendant's business. [Doc. No. 104, at p. 7.] Defendant argues that it justifiably has
 8 "strong concerns" about the risk of inadvertent disclosure of the confidential information
 9 in its publishing agreements even under the August 20, 2014 Protective Order, because
 10 plaintiff has already made an "inadvertent" filing with the Court of confidential, un-
 11 redacted documents that had to be withdrawn from the public record. [Doc. No. 104, at
 12 p. 8, citing Doc. No. 86, Notice of Withdrawal of Doc. No. 82.]

13 Plaintiff argues that un-redacted copies of the publishing agreements are
 14 discoverable because they are relevant to the calculation of plaintiff's alleged damages.
 15 Based on its false advertising claim under the Lanham Act and its unfair business
 16 practices claim, plaintiff's theory of damages is disgorgement of defendant's profits
 17 stemming from the Devor Study. [Doc. No. 104, at pp. 20-21.]

20 ² In support of this argument, defendant refers to "this Court's prior ruling that
 21 [defendant's] financial business projections were confidential and subject to a right of
 22 privacy, and that disclosure of the same was not relevant to [plaintiff's] case. [Doc. No.
 23 58.]" [Doc. No. 104, at p. 7. *See also* Doc. No. 104, at p. 13 (stating plaintiff "cannot
 24 show relevance . . . , as this Court already held when considering a similar motion. [Doc.
 25 No. 58.]"); Doc. No. 104, at p. 11 (asserting that "this Court has already noted that
 26 [defendant's] annual revenue from its certifications, licensing and education programs, as
 27 well as its business plans and revenue projections, are confidential and subject to a right
 28 of privacy, and that disclosure of the same was not relevant to [plaintiff's] case. [Doc.
 No. 58)].] The Court will not rehash the matter here but notes that defendant reads too
 much into the cited "prior ruling." [See Doc. No. 58, at pp. 6-10.] The Court also notes
 that the cited "prior ruling" [Doc. No. 58] is not relevant to the matters at issue in the
 instant Joint Motion.

1 Plaintiff also argues that un-redacted copies of the publishing agreements and
 2 “underlying financial records” are discoverable because they show defendant had a
 3 financial motive for unfair competition against plaintiff. [Doc. No. 104, at pp. 19-24.]
 4 According to plaintiff, the royalty information is “additional evidence” corroborating
 5 defendant’s financial motive for unfair competition. As a result, plaintiff argues that it
 6 will be “handicapped from meaningfully assessing whether and to what extent there was
 7 a financial incentive for [defendant] to publish the false injury data and refuse to correct
 8 the false injury data for over two years while its Journal sales soared without access to the
 9 profits [defendant] enjoyed from those sales.” [Doc. No. 104, at p. 22.]

10 Plaintiff further asserts that LWW “is in possession of an unknown quantity of
 11 financial records relating to revenues and royalties generated from the Journal” and that
 12 LWW’s “own data illustrating the popularity of the Journal edition containing the Devor
 13 Study strongly suggests [defendant] enjoyed additional profits based on the false
 14 information in the Devor Study.” [Doc. No. 104, at p. 27.]

15 Based on the arguments presented in the Joint Motion, it appears that plaintiff is
 16 attempting to expand the scope of the parties’ discovery dispute from the disclosure of
 17 un-redacted copies of the publishing agreements to also include other financial records
 18 and/or data kept by LWW related to royalties. To the extent plaintiff is attempting to do
 19 so, it is too late.³ Fact discovery in the case has been closed for some time now [Doc.
 20 No. 65, at pp. 1-2], and the only issue being considered by the Court in connection with
 21 the parties’ current Joint Motion is whether LWW must disclose un-redacted copies of its
 22 royalty agreements with defendant in response to plaintiff’s Rule 45 subpoena. [See
 23
 24

25 ³ Order Granting Joint Motion to Extend the Deadline for Completing Fact
 26 Discovery, Doc. No. 65, at pp. 1-2 (extending the fact discovery deadline to
 27 **November 30, 2015** solely for the purpose of deposing third party witnesses, including
 28 LWW); Chambers’ Rule V(A) (stating that “discovery motions shall be filed no later than
 45 days after the event giving rise to the dispute . . .” and “[f]or written discovery, the
 event giving rise to the dispute is the service of an objection, answer, or response. . . .”)

1 Order re Joint Motion for Determination of Discovery Dispute, Doc. No. 89, at pp. 1-7
 2 (denying defendant's request for a protective order and plaintiff's request for an order
 3 compelling production of un-redacted copies of the publishing agreements and allowing
 4 the parties to re-brief the issue within 20 days).]

5 Federal Rule of Civil Procedure 26(b)(1), as amended, provides in part as follows:
 6 "Parties may obtain discovery regarding any non-privileged matter that is relevant to any
 7 party's claim or defense and proportional to the needs of the case, considering the
 8 importance of the issues at stake in the action, the amount in controversy, the parties'
 9 relative access to relevant information, the parties' resources, the importance of the
 10 discovery in resolving the issues, and whether the burden or expense of the proposed
 11 discovery outweighs its likely benefit." Fed.R.Civ.P. 26(b)(1). "The court may, for good
 12 cause, issue an order to protect a party or person from annoyance, embarrassment,
 13 oppression, or undue burden or expense, . . . including . . . (A) forbidding the disclosure
 14 or discovery; . . . (D) forbidding inquiry into certain matters, or limiting the scope of
 15 disclosure or discovery to certain matters; . . . (G) requiring that a trade secret or other
 16 confidential . . . or commercial information not be revealed or be revealed only in a
 17 specified way. . . ." Fed.R.Civ.P. 26(c)(1).

18 As noted in prior Orders [Doc. No. 60, at pp. 4-8; Doc. No. 89, at p. 5], "[a] party
 19 asserting good cause [for a protective order] bears the burden, for each particular
 20 document it seeks to protect, of showing that specific prejudice or harm will result if no
 21 protective order is granted. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122,
 22 1130-1131 (2003). "Broad allegations of harm, unsubstantiated by specific examples or
 23 articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman v. International*, 966
 24 F.2d 470, 476 (9th Cir. 1992), quoting *Cipollone v. Liggett 11 Group, Inc.*, 785 F.2d 1108,
 25 1121 (3d Cir. 1986). When considering whether a protective order is appropriate, the
 26 Ninth Circuit has also indicated that the Court must balance conflicting interests, such as
 27 the risk of inadvertent disclosure of trade secrets to competitors against the risk that
 28 protection of a trade secret or confidential information would impair the ability of the

1 party seeking disclosure to prosecute or defend its claims. *Brown Bag Software v.*
 2 *Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992).

3 Under Federal Rule 45(d)(3), the Court “*must* quash or modify a subpoena
 4 that: . . . (iii) requires disclosure of privileged or other protected matter, if no exception or
 5 waiver applies. . . .” Fed.R.Civ.P. 45(d)(3)(A)(iii) (emphasis added). In addition, the
 6 Court may quash or modify a Rule 45 subpoena “if it requires: (i) disclosing a trade
 7 secret or other confidential research, development, or commercial information. . . .”
 8 Fed.R.Civ.P. 45(d)(3)(B)(i). The Court may order production of trade secret or
 9 confidential information “under specific conditions if the serving party: (i) shows a
 10 substantial need for the . . . material that cannot be otherwise met without undue
 11 hardship. . . .” Fed.R.Civ.P. 45(d)(3)(C).

12 Here, the redacted portions of the publishing agreements in dispute reveal the
 13 royalty rates defendant has negotiated with LWW for publishing services in connection
 14 with the JSCR, where the disputed article was published, and for a separate journal, the
 15 *Strength and Conditioning Journal* (“SCJ”), which does not appear to have any
 16 connection to this lawsuit. The royalty rates “are paid together for both the JSCR and the
 17 SCJ.” [Doc. No. 104-20, at p. 2.]

18 In support of its request for a protective order, defendant submitted the Declaration
 19 of Keith Cinea, who has worked for defendant since 1999. Mr. Cinea’s current title is
 20 Publications and Education Director. Previously, he held two other titles while working
 21 for defendant: (1) Educational Programs and Products Coordinator; and (2) Director of
 22 Publications and Communications. [Doc. No. 104-20, at p. 2.] Through his work,
 23 Mr. Cinea is familiar with defendant’s “negotiated payment and royalty rates with
 24 [LWW].” [Doc. No. 104-20, at p. 2.]

25 In his Declaration, Mr. Cinea outlines defendant’s position concerning the
 26 sensitive, confidential nature of the information redacted from the royalty agreements:

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1 4. Some of [defendant's] competitors, including but not limited to
2 the American College of Sports Medicine ("ACSM"), also publish journals
3 through LWW.

4 5. [Defendant] has obtained a competitive advantage through
5 negotiating favorable combined payment and royalty rates with LWW for
6 publishing the JSCR and the SCJ. The NSCA considers this information a
7 trade secret.

8 6. [Defendant] is strongly concerned that disclosure of the
9 redacted financial information in the LWW agreements, even if disclosed
10 under the Joint Protective Order in this case, will result in inadvertent
11 disclosure of the redacted financial information to [defendant's] competitors.

12 7. [Defendant] is further concerned that inadvertent disclosure of
13 the redacted financial information to its competitors will result in a loss of its
14 competitive advantage, ultimately leading to higher combined payments to
15 LWW and lower combined royalty rates from LWW for the JSCR and SCJ.

16 [Doc. No. 104-20, at p. 2.]

17 In sum, Mr. Cinea's Declaration sets forth a plausible explanation as to why
18 defendant seeks to protect the confidentiality of the information redacted from the royalty
19 agreements. Mr. Cinea's Declaration also identifies specific prejudice or harm that
20 would result if the confidentiality of the redacted information is not protected from
21 competitors. Accordingly, the Court must balance the competing interests of the parties
22 to determine whether defendant is entitled to protection of the redacted information over
23 and above that already provided in the stipulated Protective Order filed on August 16,
24 2014.

25 Defendant argues that the August 16, 2014 Protective Order does not provide
26 sufficient protection against inadvertent disclosure of the sensitive, confidential
27 information it has redacted from the publishing agreements. [Doc. No. 104-20, at p. 2.]
28 As evidence of the risk of inadvertent disclosure, defendant refers the Court to a filing
error that occurred on or about May 5, 2016. On May 5, 2016, plaintiff's counsel filed
two redacted copies of a document entitled "Joint Motion for Determination of Discovery

1 Dispute [Peer Reviewer Identities]”⁴ and numerous exhibits, totaling 670 pages (the
 2 “Peer Review Motion”). [Doc. No. 82.] Since some of the exhibits referenced in the
 3 Peer Review Motion had been designated and marked “confidential,” plaintiff’s counsel
 4 also made a separate filing on May 5, 2016, which included an un-redacted copy of the
 5 Peer Review Motion and the confidential exhibits (136 pages). [Doc. No. 83.] Contrary
 6 to the August 20, 2014 Protective Order and established procedure, plaintiff’s counsel did
 7 not file a motion on May 5, 2016 requesting to file the confidential, un-redacted Peer
 8 Review Motion and the confidential exhibits under seal.⁵ [See Doc. Nos. 82 and 83.] As
 9 a result, defendant understandably believes that the un-redacted, confidential version of
 10 the Peer Review Motion and the confidential exhibits were available in the public record
 11 as of May 5, 2016. [Doc. No. 104, at p. 12.]

12 In an e-mail dated May 6, 2016, plaintiff’s counsel notified defense counsel that:
 13 (1) a Joint Motion involving the submission of confidential documents had been misfiled;
 14 (2) someone in the office of plaintiff’s counsel had spoken with “the clerk;” and (3) the
 15 misfiled document was being re-filed “shortly.” [Doc. No. 104-21, at p. 1.] A Notice of
 16 Withdrawal filed on May 6, 2016 indicates that Docket No. 82 (*i.e.*, the non-confidential,
 17 redacted copy of the Peer Review Motion and the non-confidential exhibits) were
 18 withdrawn. However, the confidential, un-redacted copy of the Peer Review Motion and
 19 the confidential exhibits were not withdrawn (*i.e.*, Doc. No. 83). [Doc. No. 86, at pp. 1-
 20 2.] To correct its failure to file a motion to file confidential documents under seal,
 21 plaintiff’s counsel made a second filing on May 6, 2016, which included: (1) an
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 24 ⁴ This Joint Motion shows redactions on some pages because it refers to documents
 25 designated “confidential.”

26 ⁵ The Court has been advised by the Clerk’s Office that plaintiff’s filing of the Peer
 27 Review Motion should have resulted in three separate docket entries on May 5, 2016 in
 28 the following order: (1) a non-confidential, redacted copy of the discovery motion and
 the non-confidential exhibits; (2) a motion or application to file documents under seal;
 and (3) the un-redacted, confidential version of the motion and the confidential exhibits.

1 Application to File Materials Under Seal; (2) another non-confidential, redacted copy of
2 the Peer Review Motion; and (3) the non-confidential exhibits (629 pages).

3 The Court has reviewed the relevant docket entries for May 5 and 6, 2016 and has
4 spoken with the Clerk's office. The Court has been advised by the Clerk's Office that no
5 un-redacted, confidential documents were available in the public record at any time in
6 connection with plaintiff's filings of the Peer Review Motion on May 5 and 6, 2016.
7 [Doc. No. 82.] On the other hand, the above-described filing errors did occur. Under the
8 circumstances, it was understandable that defense counsel believed confidential
9 documents were accessible to the public as a result of the filing errors.

10 Although no confidential documents were accessible by the public in connection
11 with plaintiff's filings on May 5 and 6, 2016, the errors are enough to raise some
12 concerns about the potential for inadvertent disclosure of confidential documents. The
13 parties have filed a total of eight Joint Motions seeking the Court's intervention in
14 resolving discovery disputes. Each of these Joint Motions and accompanying exhibits
15 have been voluminous (120 to 1,435 pages). Several of these Joint Motions have
16 involved the filing of confidential documents with a corresponding motion to file the
17 confidential documents under seal. Summary judgment motions have also been filed
18 with confidential documents and a corresponding motion to file documents under seal.

19 It stands to reason that the risk of filing errors resulting in the inadvertent
20 disclosure of confidential documents in the public record increases whenever the parties
21 are submitting a large volume of electronic filings that are voluminous and complex and
22 that include a significant number of confidential documents attached as exhibits. The
23 misfiling incident on May 5 and 6, 2016 could easily have resulted in the disclosure of
24 confidential documents in the public record. In addition, the Court recalls that plaintiff
25 previously initiated a Joint Motion requesting an order striking certain "confidential"
26 designations by defendant so that it could file confidential documents in the public record
27 and use them to publicly discredit defendant in the media. In this regard, the Court
28 denied plaintiff's request. [Doc. Nos. 60, 51, 49.]

1 Given all the facts and circumstances, this Court cannot conclude that defendant's
2 concern about the potential for inadvertent disclosure of its confidential documents in the
3 public record is groundless. Nor could the Court presume that the August 16, 2014
4 Protective Order is sufficient to mitigate defendant's concern about the possibility of
5 inadvertent disclosure of documents that could result in significant adverse financial
6 consequences.

7 Plaintiff has not argued convincingly that it has a "substantial need" for un-
8 redacted copies of the publishing agreements that outweighs defendant's interest in
9 maintaining the confidentiality of its financial arrangements with LWW. Nor does it
10 appear that plaintiff would be prejudiced in its ability to prosecute its case against
11 defendant if it does not obtain un-redacted copies of the publishing agreements.

12 As noted above, plaintiff seeks access to un-redacted copies of the publishing
13 agreements for two reasons. First, plaintiff believes that the redacted portions of the
14 publishing agreements are relevant to its calculation of its alleged damages based on a
15 theory of disgorgement of profits stemming from the Devor Study. [Doc. No. 104, at pp.
16 20-21.] As noted above, it appears undisputed that the redacted portions of the
17 publishing agreements show the royalty rates defendant has negotiated with LWW for
18 publishing services in connection with the JSCR, where the disputed article was
19 published, *and* for the SCJ, a separate journal. The royalty rates are paid together for
20 both the JSCR and the SCJ. [Doc. No. 104-20, at p. 2.]

21 The Court acknowledges the possibility that the redacted royalty information may
22 have some tangential relevance to the issue of damages. However, that is not enough
23 given the evidence submitted by defendant indicating it has a strong interest in
24 maintaining the confidentiality of the redacted royalty information. Without more, it
25 does not appear that the redacted royalty information would be necessary to calculate
26 profits stemming from the Devor Study. In other words, it appears that plaintiff's request
27 for access to the redacted royalty information exceeds the scope of information necessary
28 to calculate the type of damages plaintiff is seeking. The royalty rates redacted from the

1 publishing agreements would not show information such as defendant's gross revenues
2 from actual sales of the JSCR during the relevant time period; the number of actual sales
3 of the JSCR during the relevant time period less costs; or any increase in actual sales of
4 the JSCR after the Devor Study was published. In narrowly tailored written discovery
5 requests or during Rule 30(b)(6) depositions, plaintiff should have already obtained the
6 data and other information typically used to calculate any alleged damages based on a
7 disgorgement of profits theory. In sum, based on the limited information presented, the
8 Court is unable to discern any reason why plaintiff would have a substantial need to
9 invade the confidential, private financial arrangements between defendant and LWW that
10 would be revealed in un-redacted copies of the subject publishing agreements in order to
11 calculate its alleged damages.

12 Second, plaintiff believes that un-redacted copies of the publishing agreements are
13 relevant to show defendant's alleged financial motive to engage in unfair competition.
14 However, it is apparent based on the arguments presented in the Joint Motion that
15 plaintiff only seeks access to the private, confidential royalty information as "additional
16 evidence" to corroborate other evidence it has already obtained to use in proving its
17 theory that defendant had a financial incentive to engage in unfair competition. [Doc.
18 No. 104, at p. 22.] Defendant's desire for additional corroborating evidence of motive
19 must be balanced against defendant's strong interest in maintaining the confidentiality of
20 the royalty payments it has negotiated with its publisher, LWW, which is not a party to
21 the action. [Doc. No. 104-20, at p. 2.] Based on the arguments and information
22 presented, it is this Court's view that the burden to defendant of having un-redacted
23 copies of the publishing agreements disclosed in this litigation exceeds any likely benefit
24 to plaintiff in prosecuting its case against defendant.

25 In sum, defendant submitted enough evidence to establish a strong interest in
26 maintaining the confidentiality of the royalty information redacted from the publishing
27 agreements. Defendant also made some showing as to why it does not believe the
28 August 16, 2014 Protective Order is enough to protect the confidentiality of this

1 information. Plaintiff did not show a substantial need for the redacted information that
2 would outweigh defendant's strong interest in maintaining the confidentiality of its
3 royalty arrangements with third party LWW.

4 **Conclusion**

5 Based on the foregoing, IT IS HEREBY ORDERED THAT:

6 1. Plaintiff's request for an order requiring production of un-redacted copies of
7 defendant's publishing agreements with LWW is DENIED;

8 2. Plaintiff's Rule 45 subpoena served on served on third party Lippincott
9 Williams & Wilkins ("LWW") is QUASHED to the extent it seeks un-redacted copies of
10 plaintiff's publishing agreements with LWW;

11 3. Defendant's request for a protective order precluding disclosure of un-
12 redacted copies of its publishing agreements with LWW is GRANTED; and

13 4. Plaintiff's request to recover reasonable expenses for participating in
14 bringing the instant Joint Motion is DENIED.

15 IT IS SO ORDERED.

16 Dated: October 7, 2016



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18 Hon. Karen S. Crawford
19 United States Magistrate Judge
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